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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 419.

Globe Indemnity Company, Petitioner,

v.

The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

BRIEF OF PETITIONER.

I. THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 40 to 45) filed July 15, 1932, is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 52 to 56) and the dissenting opinion of Woolley, *Cir. J.* (R. 56), both filed July 10, 1933, are reported in 66 F. (2d) 302-304 (Advance Sheets of October 9, 1933).

II. STATEMENT OF THE CASE.

This is a suit on a bond given under the "Hurd Act" (Act of August 13, 1894, 28 Stat. at L. 278, Chap. 280, as amended by the Act of February 24, 1905, 33 Stat. at L. 811, Chap. 778, and the Act of March 3, 1911, 36 Stat. at L. 1167, Chap. 231, Sec. 291, 40 U. S. C. Sec. 270) which requires contractors for government construction to provide bonds conditioned upon the satisfactory performance of the construction contract and the payment of laborers and materialmen. The bond (R. 19) is in the prescribed form and runs to the United States as obligee. The respondent is an unpaid materialman who brought this suit in the name of the United States and the petitioner is the surety upon the bond on which The Sanitation Corporation (the contractor) was the principal.

The Hurd Act provides:*

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall * * * have a right of action * * * provided that * * * it * * * shall be commenced within one year after the performance and final settlement of said contract, and not later."

The present suit was brought on October 17, 1928 (R. 1) and the defense was that because perform-

*The act is reprinted in full in the appendix to this brief at page 51.

ance and final settlement had occurred prior to October 17, 1927, the suit was not brought within one year and was therefore brought too late (R. 7, 8).

There is no dispute as to any fact bearing upon the date of performance and final settlement of the contract. The contract was for materials for use in the Umatilla (McKay Dam) irrigation project and was made for the United States by the Department of the Interior (R. 17, 18), under the Reclamation Act of 1902 (Act of June 17, 1902, 32 Stat. at L. 388, 43 U. S. C. Secs. 391 and 419).

By letter dated June 16, 1927, the First Assistant Secretary of the Department of the Interior forwarded the claim of The Sanitation Corporation, the contractor, to the General Accounting Office for direct settlement, in which letter he states "The claim has received administrative examination, is approved for $8,889.30 and I recommend that the amount found due be paid from the Reclamation Fund-4X502" (R. 28).

On October 26, 1927, the General Accounting Office issued its formal certificate of settlement (R. 28-30) and the amount found due by the Department of the Interior was paid on November 5, 1927 (R. 30).

The question involved is whether "performance and final settlement" of the contract between The Sanitation Corporation and the United States took place on June 16, 1927, when the First Assistant Secretary of the Department of the Interior approved the claim in a specified amount, or on October

26, 1927, when the General Accounting Office issued its certificate of settlement in that same amount.

The United States District Court for the Eastern District of Pennsylvania, in an opinion by Kirkpatrick, *J.* (R. 40-45), held that performance and final settlement took place on June 16, 1927, and that this suit, which was commenced on October 17, 1928, was brought too late.

The Circuit Court of Appeals for the Third Circuit reversed the judgment of the District Court and held (R. 56) that performance and final settlement took place on October 26, 1927, and that this suit was therefore brought within one year from the date of performance and final settlement.

The opinion of the Circuit Court proceeds on the theory that the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71) required that the date of performance and final settlement must be determined by the action of the General Accounting Office and not by the action of the Department of the Interior, the department having administrative charge of the work covered by the contract.

Circuit Judge Woolley dissented from this view and concurred with the District Court (R. 56). In his opinion the Budget and Accounting Act of 1921 did not repeal or change the provisions of the Hurd Act under which, as construed by this Court, subcontractors' suits must be brought within a year from the performance and final settlement of the

contract, as evidenced by an administrative determination made by the department having supervision of the work.

III. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was the date upon which the General Accounting Office issued its certificate and not the date upon which the Department of the Interior approved the claim of the contractor for payment.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was determined by the proceedings taking place under the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71).*

4. The Circuit Court of Appeals for the Third Circuit erred in holding that the present suit was brought within one year after performance and final settlement of the contract.

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*The relevant provisions of this statute are reprinted in the appendix to this brief at pages 38 to 43.

IV. ARGUMENT.

Summary.

A. THE HURD ACT CONTEMPLATES AN ENGINEERING RATHER THAN A MERE FISCAL DETERMINATION OF THE DATE OF "PERFORMANCE AND FINAL SETTLEMENT."

1. This court so held in *Illinois Surety Co.* v. *United States to use of J. A. Peeler,* 240 U. S. 214.

2. Reason for the rule:

When the department having charge of the work records its decision that a contractor has performed the contract, the bond should be made available for materialmen without delay caused by accounting routine.

B. THE BUDGET AND ACCOUNTING ACT OF 1921 DID NOT SO CHANGE THE PRIOR LAW AS TO REQUIRE THE DATE OF "PERFORMANCE AND FINAL SETTLEMENT" TO BE DETERMINED BY THE GENERAL ACCOUNTING OFFICE INSTEAD OF THE INTERIOR DEPARTMENT.

1. *Lambert Lumber Co.* v. *Jones Engineering & Construction Co. Inc.,* 47 F. (2d) 74, Certiorari denied 283 U. S. 842, does not hold that the Budget and Accounting Act of 1921 changed the prior law.

2. To require a determination by the General Accounting Office would unduly delay subcontractors without any advantage to the United States.

3. The General Accounting Office is not able to make an engineering determination that the contractor has performed the contract.

4. The Budget and Accounting Act of 1921 is in language almost identical to the previous statutes and therefore did not change the prior law.

5. *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995, Certiorari denied 287 U. S. 613, held that the Budget and Accounting Act of 1921 did not change the prior law.

6. Both under the prior law and under the Budget and Accounting Act of 1921 the lower courts have held that the date of "performance and final settlement" might be determined by departments other than the Treasury or the General Accounting Office.

7. Congress has conferred upon the Secretary of the Interior the most complete authority over all matters relating to reclamation projects. This necessarily includes the power to determine the date of "performance and final settlement."

C. THE INTERIOR DEPARTMENT IN THE PRESENT CASE ACTUALLY DETERMINED THE DATE OF "PERFORMANCE AND FINAL SETTLEMENT."

1. It did not merely pass this function to the General Accounting Office as was the case in *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74.

A. The Hurd Act contemplates an engineering rather than a mere fiscal determination of the date of "performance and final settlement."

In *Illinois Surety Co.* v. *United States to the use of J. A. Peeler*, 240 U. S. 214, it appeared that although the work in question was a post office building the construction was under the charge of the Secretary of the Treasury and under the general supervision of the supervising architect (240 U. S. at 221). Suit was brought by an unpaid subcontractor on March 4, 1913, and after an amendment in the pleadings the surety defended on the ground that the suit was premature in that it had been brought within six months of the date of performance and final settlement. It further appeared, however, that on August 21, 1912, the supervising architect reported to the Secretary that all the work had been satisfactorily completed and on the same day the recommendation of the supervising architect that a voucher in a fixed amount be drawn was approved by direction of the Secretary of the Treasury. This date, instead of the date upon which the voucher was actually drawn, was held to be the date of performance and final settlement, and accordingly the suit of the subcontractor was not premature.

The opinion of the Court, which was delivered by Mr. Justice Hughes, points out that the Hurd Act, in its original form, was defective in that it did not give the United States an adequate opportunity to enforce its demands against the contractor's surety

nor did it adequately provide for priority of the claim of the United States upon the bond. Accordingly, the Hurd Act was amended in 1905 to remedy these defects. Obviously the policy of the amended statute is to allow subcontractors to bring suit as promptly as possible after the United States has determined that it will have no claim upon the bond. In stating the purpose of the amendment of 1905 and its effect, Mr. Justice Hughes, in the *Peeler* case (240 U. S. at 218) said:

> "With this object in view,—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (United States use of Alexander Bryant Co. *v.* New York Steam Fitting Co., 235 U. S. 327, 337, 59 L. ed. 253, 257, 35 Sup. Ct. Rep. 108),—it was natural that the time allowed exclusively for action by the government should begin to run when the contract had been completed, and the government, in its final adjustment and settlement according to established administrative methods, had determined what amount, if any was due. Then the government would have ascertained the amount of its claim, if it had one, and could bring suit if it desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment."

The nature of this determination is clearly stated at page 221:

> "* * * it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting *the appropriate administrative determination* with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained." (Italics ours.)

That the *appropriate administrative determination* is to be made by the department having charge of the work rather than by the department having charge of government accounting is made clear at pages 221 and 222:

> "In the present case, *the construction of the building was in charge of the Secretary of the Treasury* and under the general supervision of the supervising architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. Act of June 6, 1902, 32 Stat. at L. 326, chap. 1036, Comp. Stat. 1913, §6922. On August 21,

> 1912, the supervising architect having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act." (Italics ours.)

We submit, therefore, that this court clearly had in mind an engineering rather than a mere fiscal or accounting determination. Hence the determination is to be made by the department in charge of the construction, for it is the only department that can properly determine the *"performance"* of its own contract.

It is possible to inject some confusion into the situation owing to the coincidence that in the *Peeler* case the department having charge of the construction happened to be the same department in which the accounting and fiscal business of the Government was carried on. This coincidence, however, should not be allowed to obscure what we submit to have been the very foundation of the decision. In the *Peeler* case the supervising architect reported that

the contract had been fully performed. On the same day his report was approved by the Secretary of the Treasury. That was the date of performance and final settlement. It was a date fixed as a result of an engineering determination. The fiscal or accounting determination would, at the time the *Peeler* case was decided, have been made by the Auditor of the Treasury under the provisions of Sections 7 and 8 of the Act of July 31, 1894, 28 Stat. at L. 206, subject to an appeal to the Comptroller of the Treasury under Section 8 (28 Stat. at L. 207).* In affirming the judgment and holding that the date of performance and final settlement had been determined by the Secretary of the Treasury, we submit that this Court has necessarily held that the *appropriate administrative determination,* referred to in the opinion, is an engineering and not a mere fiscal or accounting determination.

The lower federal courts have so understood the opinion of this court in the *Peeler* case. They have held performance and final settlement might take place although the amount due the contractor was subject to change or a portion thereof was retained. *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995 (C. C. A. 4th, 1932), Certiorari denied 287 U. S. 613; *United States to Use of Stallings* v. *Starr,* 20 F. (2d) 803 (C. C. A. 4th, 1927); *Antrim Lumber Co.* v. *Hannan,* 18 F. (2d) 548 (C. C. A. 8th, 1927); *United States to Use of*

*The relevant provisions of Sections 7 and 8 of this statute are reprinted in the appendix to this brief at pages 46 to 48.

Wennemer Const. Co., Inc. v. *Arnold,* 268 Fed. 130 (D. C. Conn. 1920); *United States for Use of R. Haas Electric & Mfg. Co.* v. *Title Guaranty & Surety Co.,* 254 Fed. 958 (C. C. A. 7th, 1918); *Robinson* v. *United States to the use of Brown-Ketcham Iron Works,* 251 Fed. 461 (C. C. A. 2nd, (1918); *United States ex rel Brown-Ketcham Iron Works* v. *Robinson,* 214 Fed. 38 (C. C. A. 2nd, 1914). Obviously, the important thing for the purpose of suits under the Hurd Act is the date on which the department having charge of the work determines that it has been performed and the Government will have no claim upon the bond and not the date on which minor disputes or matters of accounting routine are disposed of.

This rule is based upon sound reason. The Hurd Act provides for a bond which is to serve a dual purpose in that it is to protect not only the United States but also the subcontractors. In its latter aspect the Hurd Act has been held by this Court to be highly remedial and it is construed liberally in order to protect persons who furnish labor or materials to Government contractors (*Brogan* v. *National Surety Co.,* 246 U. S. 257, 262). Such persons cannot sue until the expiration of six months from the date of both "performance and final settlement" of the principal contract. To give the Hurd Act the effect which Congress intended it to have, the bond should be made available to subcontractors at the earliest possible date consistent with reasonable protection

to the United States. When the department having charge of the work records its engineering determination that the Government will have no claim upon the bond, that obligation should be made available to subcontractors without further delay than the six months period during which the United States alone can bring suit. As this Court said in the *Peeler* case, nothing is gained by postponing the date to the time of payment. It is equally true that nothing is to be gained by postponing the date to the time when the acounting officers (four months later in this case) did an act which is merely a preliminary to payment and not a prerequisite to a determination by the Government that it will have no claim upon the bond. This thought was well expressed by the Circuit Court of Appeals of the Second Circuit in *Robinson* v. *United States to the use of Brown-Ketcham Iron Works*, 251 Fed. 461, 465 (C. C. A. 2nd, 1918):

> "The limitation of time in the statute was intended for the benefit of the United States, and as soon as the rights of the United States on the bond were out of the way the subcontractors had the right to sue, assuming, of course, that their own contracts gave them rights against the main contractor. Illinois Surety Co. *v.* Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609. In other words, when it appears that the United States, through its proper officials, has indicated a determination not to sue on the bond by final settlement, and six months have elapsed, then the

security becomes open to those who have trusted to the credit of the main contractor.

"It appears from the letter of the supervising architect that final settlement was approved by the Secretary of the Treasury under date of February 10, 1909. It is true that a part of the contract price was reserved for the completion of certain unfinished work, but enough had been completed to satisfy the United States that a final settlement could be made, and such final settlement was in fact made, and if it should later appear that the United States, acting through its officials, was wrong in that regard, it was the United States and none other which took the risk that by intermediate recoveries the subcontractors might so deplete the fund that the United States would bear the loss, if any, if it erred in approving the contract as finally settled. The word 'completion,' in view of the purposes of the statute, and the attitude of the courts in giving those purposes effect, must be construed as meaning *that the contract was completed in the sense that the United States was satisfied that enough had been done to discharge the surety as to the United States.* Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A subcontractor who had performed his work would be compelled to wait for some indefinite period because some other subcontractor, or the main contractor himself by reason of some default or dispute, made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen

that in a contract involving, as did the contract at bar, over a million dollars, a subcontractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longer looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the subcontractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract." (Italics ours.)

In order to give effect to the intention of Congress to provide a bond to protect not only the United States but also to protect subcontractors, we submit that it is necessary to hold, as this Court did in the *Peeler* case, that the date of performance and final settlement is that day upon which the department having charge of construction records its decision that the government is satisfied with the work and not the day on which the Accountng Officers audit this determination. To require subcontractors to wait the completion of accounting routine is, we submit, to defeat some of the essential purposes for which the statute was enacted without any advantage whatever to the Government.

The court below conceded (R. 55) that prior to the enactment of the Budget and Accounting Act of

1921 the department having charge of the construction, in this case the Department of the Interior, was the appropriate department to fix the date of performance and final settlement. But it held that the Budget and Accounting Act of 1921 had changed the law and that this function was now lodged exclusively in the General Accounting Office.* It was on this point that Judge Woolley dissented in the court below (R. 56).

B. The Budget and Accounting Act of 1921 did not so change the prior law as to require the date of "performance and final settlement" to be determined by the General Accounting Office instead of the Interior Department.

The court below has held that subsequent to the Budget and Accounting Act of 1921, the date of performance and final settlement cannot be fixed by the department having charge of the work but must be fixed exclusively by the General Accounting Office. For that conclusion the court below relies upon *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 842.

A reading of Judge Kenyon's opinion in that case creates the impression that he is not in sympathy with the rule of the *Peeler* case and leads one to

*The lower federal courts in numerous cases, both before and after the Budget and Accounting Act of 1921, have held that departments other than the Treasury or the General Accounting Office had power to determine the date of performance and final settlement. The cases are collected on pages 26 to 28 *infra* of this brief.

believe that he would like to change that rule and have the date of completion and final settlement determined in every case by proceedings in the General Accounting Office. He did not, however, so decide. It appeared that the Veterans' Bureau, which had charge of the work, instead of determining that the contractor had fully performed, passed along to the General Accounting Office the task of making that determination.* Accordingly, Judge Kenyon did not decide whether the Veterans' Bureau was deprived by the Budget and Accounting Act of power to make such a determination. He found such a decision unnecessary, saying, at page 78:

> "The broader question whether any final settlement of a claim or demand against the government, except where there is specific authority from the Congress, can now, in view of the Act of June 10, 1921, be settled and adjusted except in the General Accounting Office, is not necessary to be determined."

Cases of this kind therefore have no bearing whatever upon the present case. The most that can be said of them is that they decide that the General Accounting Office has power to determine the date of peformance and final settlement where that determination has not been made by the department having charge of the construction. They do not

*This point is brought out more fully in our discussion of *Lambert Lumber Co. v. Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 842, at page 34 of this brief, *infra*.

decide that such power now resides exclusively in the General Accounting Office.

Indeed, it would be somewhat surprising if Congress had intended to make the jurisdiction of the General Accounting Office in this respect exclusive. Congress intends subcontractors to have a right to sue upon the bond. Congress, presumably intends this right to accrue at the earliest possible moment consistent with the reasonable protection of the United States. To hold that the subcontractors must wait until the matter has been determined by the General Accounting Office not only subjects the subcontractors to considerable delay (in this case a delay of over four months) but also requires the General Accounting Office to determine questions for which it is by no means qualified, and leads to no advantage to the United States.

How can the General Accounting Office determine, for example, that a battleship has been fully constructed in accordance with the plans and specifications? This is obviously an engineering determination to be made in the Navy Department and when it has been made by that Department the bond should be made available for subcontractors without waiting for the purely accounting and fiscal routine which is to be performed by the General Accounting Office. If the Navy Department has made a mistake the United States is nevertheless amply protected inasmuch as no subcontractor can start a suit until six months have elapsed, during which period the

United States alone may bring suit upon the bond. Moreover, the United States may sue on the bond even though more than a year has elapsed since performance and final settlement. See *United States v. Marshall*, 225 Fed. 687 (S. D. N. Y. 1914), affirmed 225 Fed. 760 (C. C. A. 2nd, 1915), and *Antrim Lumber Co. v. Hannan*, 18 F. (2d) 548 (C. C. A. 8th, 1927).

That Congress did not intend the Budget and Accounting Act of 1921* to change the prior law, becomes obvious when we compare that statute with the provisions of the statutes which, prior to the enactment of the Budget and Accounting Act, regulated the fiscal and accounting operations of the Government.† These old and new statutes are substantially identical and the only effect of the Budget and Accounting Act, as applied to the present case, was to transfer to the General Accounting Office a function which had hitherto been lodged in the Treasury Department. The nature of the function was left unchanged.

The Circuit Court of Appeals in the present case first cites (R. 55) the provisions of Sec. 304 of the Budget and Accounting Act of 1921 (31 U. S. C. Sec. 44), the relevant parts of which are as follows:

"'All powers and duties which on June 30, 1921, were conferred or imposed by law upon the

* The relevant provisions of the Budget and Accounting Act are reprinted in the appendix to this brief at pages 38 to 43.

† The relevant provisions of the statutes in force prior to the Budget and Accounting Act are reprinted in the appendix to this brief at pages 44 to 50.

> Comptroller of the Treasury or the six auditors of the Treasury Department * * * shall * * * be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * *.'"

The last sentence of the above quotation is not, however, substantially different in effect from the language of Sec. 8 of the Act of July 31, 1894, 28 Stat. at L. 207, which provided:

> "The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, that the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account."

The court below next relies (R. 55) upon the provisions of Section 305 of the Budget and Accounting Act of 1921 (31 U. S. C. Sec. 71), which are as follows:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

This is simply an amendment of R. S. Sec. 236, which was in the following language:

> "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

The court below next cites (R. 55) the following provisions found in 31 U. S. C. §74:

> "'Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in this section and section 72 of this title. * * *
>
> "'Disbursing Officers, or the head of any executive department, * * * may apply for and

> the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern said office in passing upon the account containing said disbursement.' "

The Circuit Court apparently thought that this language was a new provision made effective by the Budget and Accounting Act and was thus support for its conclusion that that act changed the law of the *Peeler* case.

This language, however, is not found in the Budget and Accounting Act of 1921 and it is not new. It was originally contained in Section 8 of the Act of July 31, 1894, c. 174, 28 Stat. at L. 207.* The compilers of the United States Code have merely altered the language of the Act of 1894 by substituting the words "General Accounting Office" for "Comptroller of the Treasury" or "Auditor," in order to make the terminology of the Act of 1894 conform to the scheme of the Budget and Accounting Act of 1921. Thus this provision was in effect when the *Peeler* rule was announced and during all the subsequent years in which it has been followed. It cannot be relied on to change that rule.

It is obvious, therefore, that there is nothing in the Budget and Accounting Act which so changed the law as to make it impossible for the department hav-

*The provisions of this section are reprinted in the appendix to this brief at pages 46 to 48.

ing charge of the construction to determine the date of performance and final settlement for the purpose of suits by subcontractors under the Hurd Act. We submit that Judge Woolley, dissenting in the court below, was clearly right when he said (R. 56) that the Budget and Accounting Act of 1921 had not changed the prior law.

Judge Woolley's conclusion is borne out by the decision in *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co.*, 57 F. (2d) 995 (C. C. A. 4th, 1932), Certiorari denied 287 U. S. 613, in which the Circuit Court said, at page 997:

> "It is argued that there was no showing that there had ever been a final settlement within the meaning of the Hurd Act because there was no evidence of a settlement in the general accounting office, as required by the Budget and Accounting Act of 1921. Act June 10, 1921, §305 (31 USCA §71). We are not impressed by this argument. Undoubtedly, where the Comptroller General actually makes the administrative determination of the amount due, as in Lambert Lumber Co. *v.* Jones Engineering & Construction Co, (C. C. A. 8th) 47 F. (2d) 74, his determination is the settlement within the meaning of the act. But in other cases laborers and materialmen are not to be delayed in the assertion of their claims against bonds of public contractors until the Comptroller General's office shall have completed the auditing of the accounts of the disbursing officers. We think that, when the government official charged with responsibility in the premises

officially determines the balance due to or from the contractor and makes a record of such determination, this is a final settlement within the meaning of the Hurd Act, notwithstanding that the accounts of disbursing officers are subject to audit in the Comptroller General's office. Just as the fact that the right to sue on the bond is not delayed by the contingency that the determination of the officer may not be approved by the courts (Ill. Surety Co. *v.* United States, 240 U. S. 214, 221, 36 S. Ct. 321, 60 L. Ed. 609), so it is not to be delayed by the contingency that such determination may not be approved by the Comptroller General's Office in its auditing of the accounts. We regard the decision in Illinois Surety Co. *v.* United States, *supra*, as determinative of the matter. While it is true that that case was decided before the passage of the Budget Act of 1921, accounts at that time were subject to revision in the Treasury Department under a statute of a wording very similar to that upon which the surety company relies. Rev. St. §236."

Respondent will doubtless endeavor to distinguish the *Smoot* case on the ground that there was no submission to the General Accounting Office at all. This attempted distinction merely emphasizes the true points decided in that case, namely: (1) That it is not necessary to have the date of performance and final settlement determined by the General Accounting Office and consequently the materialman need not allege that there had been a submission to that office; (2) That the War Department had power to deter-

mine, and did determine, the date of performance and final settlement; and (3) That this determination by the War Department fixes the time for bringing suits under the Hurd Act, notwithstanding what might or might not take place thereafter in the General Accounting Office. If the materialman had awaited the action of that office, it might very well have been too late for him to bring suit within the period required by the Hurd Act.

Prior to the effective date of the Budget and Accounting Act of 1921, the lower federal courts very frequently recognized and gave effect to determinations of the date of the performance and final settlement by departments other than the Treasury Department, which at that time exercised the very same functions now lodged in the General Accounting Office. For example, in the following cases the date of performance and final settlement was determined by the Navy Department: *Stitzer* v. *United States to use of Vaughan,* 182 Fed. 513 (C. C. A. 3d, 1910); *United States to Use of Wennemer Const. Co., Inc.* v. *Arnold,* 268 Fed. 130 (D. C. Conn. 1920); *United States Fidelity & Guaranty Co.* v. *United States to Use of Smoot,* 298 Fed. 365 (Ct. of App. D. C. 1924); *United States for Use of R. Haas Electric & Mfg. Co.* v. *Title Guaranty & Surety Co.,* 254 Fed. 958 (C. C. A. 7th, 1918); *Mandel* v. *United States to Use of Wharton & N. R. Co.,* 4 F. (2d) 629 (C. C. A. 3d, 1925), Certiorari denied 268 U. S. 698; *United States to Use of Crellin* v. *George F. Pawling & Co.,* 297 Fed. 65

(C. C. A. 3d, 1924); *United States Fidelity & Guaranty Co.* v. *McNulty Bros., Inc.*, 13 F. (2d) 78 (C. C. A. 1st, 1926). In the following cases the determination was made by the War Department: *United States to Use of Union Gas Engine Co.* v. *Newport Shipbuilding Corporation, Limited*, 18 F. (2d) 556 (C. C. A. 4th, 1927); *Pederson* v. *United States for the Use of Washington Iron Works*, 253 Fed. 622 (C. C. A. 9th, 1918). And in *Antrim Lumber Co.* v. *Hannan*, 18 F. (2d) 548 (C. C. A. 8th, 1927), the determination was made by the Department of the Interior. While many of these cases were decided subsequent to 1921, in each of them it appeared that the work had been done and the date of performance and final settlement had been determined prior to the effective date of the Budget and Accounting Act of 1921.

Since the enactment of that statute it might be expected that the courts would continue to apply the same rule, because the Budget and Accounting Act of 1921 simply transferred to the General Accounting Office functions which had hitherto been performed by the Department of the Treasury, without making substantial changes in those functions. The few cases which have arisen since 1921 show that the Circuit Courts of Appeal, with the exception of the court below in the present case, have not departed from the previously established rule which contemplated that the date of performance and final settlement could be determined as an engineering rather than

an accounting matter. For example, it has been held that the date of performance and final settlement might be determined in the War Department: *Consolidated Indemnity & Ins. Co.* v. *W. A. Smoot & Co., Inc.*, 57 F. (2d) 995 (C. C. A. 4th, 1932), Certiorari denied 287 U. S. 613; *United States to Use of Stallings* v. *Starr*, 20 F. (2d) 803 (C. C. A. 4th, 1927); and in two recent cases the Department of Agriculture was held to have this power: *Southern Surety Co.* v. *Western Pipe & Steel Co.*, 16 F. (2d) 456 (C. C. A. 9th, 1926); *United States Fidelity & Guaranty Co.* v. *United States to use of Price*, 65 F. (2d) 639 (C. C. A. 9th, 1932).

These decisions holding that some department other than the Treasury or the General Accounting Office actually did fix the date of performance and final settlement necessarily decide that such department (1) had authority to make that determination and (2) actually did make it.

Respondent will no doubt contend that the present case is the first one in which there were two documents which could be construed as determining the date of performance and final settlement; that there cannot be two such determinations; and that since the Budget and Accounting Act of 1921 gives the General Accounting Office power to settle all claims against the United States the certificate of that department must, for the purposes of this suit, be considered the official determination.

It is our position that although the General Ac-

counting Office may have power to determine the date of performance and final settlement in cases where such determination has not been made by the department having charge of the work [see for example *Lambert Lumber Co.* v. *Jones Engineering & Construction Co., Inc.*, 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 849], in any case in which that department does determine the date of performance and final settlement, such determination governs the time in which suits can be brought under the Hurd Act and this we submit to be true regardless of what may thereafter take place in the General Accounting Office. That the Secretary of the Interior had power in the present case to determine the date of performance and final settlement is made clear by the broad powers conferred by Congress upon him with respect to the very contract now under consideration. This contract was made by the Secretary under the provisions of the Reclamation Act of June 17, 1902, 32 Stat. at L. 388 and its amendments and supplements. Section 2 of that act (43 U. S. C. Sec. 411) provides:

> "That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct * * * irrigation works for the storage, diversion, and development of waters * * *."

Section 4 of the same statute (43 U. S. C. Sec. 419) provides:

> "That upon the determination by the Secretary of the Interior that any irrigation project is

practicable, he may cause to be let contracts for the construction of the same * * *."

The general authority of the Secretary was set forth in Section 10, the language of which is now found in 43 U. S. C. Sec. 373:

> "That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

By these statutory provisions Congress clearly intended to confer on the Secretary of the Interior complete supervision over the construction of reclamation projects. One of the most important and obvious functions committeed to the Secretary is the power to determine whether or not the contractor has fully performed his contract. When the Secretary has determined that the contractor has performed and has evidenced this determination by approving the amount due the contractor, we submit that the Secretary has at the same time determined the date of performance and final settlement for the purposes of the Hurd Act, regardless of any subsequent action in the General Accounting Office.

The argument to the contrary wholly overlooks the purpose of the Hurd Act, which was to give protection to subcontractors and give it promptly. It overlooks the basis upon which the *Peeler* case is

founded, namely, that as soon as the department in charge of the construction has determined, from an engineering standpoint, that the Government will have no claim upon the bond, that obligation should be made available to subcontractors. It overlooks the considerations which make such a determination peculiarly appropriate to the department under whose supervision the work is done, and peculiarly inappropriate to the General Accounting Office. It treats this case as though it involved a claim against the United States rather than a claim by an unpaid subcontractor suing, in the name of the United States, the surety on a statutory obligation.

We submit, therefore, that the Department of the Interior had power to determine the date of performance and final settlement for the purposes of the Hurd Act; that this function was not placed by the Budget and Accounting Act of 1921 in the exclusive jurisdiction of the General Accounting Office; and that the determination of the Department of the Interior is controlling even though the General Accounting Office four months later issued a certificate as a part of its fiscal duties.

C. The Interior Department in the present case actually determined the date of "performance and final settlement."

The District Court found that the date of performance and final settlement was June 16, 1927, on which date the First Assistant Secretary of the Department

of the Interior forwarded the claim of The Sanitation Corporation, the contractor, to the General Accounting Office. The Secretary's letter, written on that date, commences with the statement (R. 24):

> "I am enclosing herewith for direct settlement claim of the Sanitation Corporation of New York City."

Obviously, the phrase "direct settlement" is used in this sentence to mean direct payment. The letter then reviews in detail the facts of the matter, certifying to the "complete delivery of the valves," on a certain date and enclosing the full file of correspondence, including the recommendations of the Chief Engineer. The letter concludes with the following two sentences (R. 28):

> "As shown by the correspondence no extension is recommended by the engineer whose determinations, in accordance with the provisions of paragraph 11 of the specifications governing the allowance of extensions of time, 'shall be final and conclusive.'
>
> "The claim has received administrative examination, *is approved* for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502." (Italics ours.)

Note that the Secretary refers to the recommendations of his Chief Engineer and points out the provision of the contract that they "shall be final and

conclusive." Following this, note his categorical statement that the claim "has received administrative examination, is approved for $8,899.30." The word "approved" is a word of finality. The appropriate department has examined the facts, has certified to complete delivery, has secured the recommendations of its Chief Engineer and has *approved* the claim in a specified amount. The last clause of the letter "and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502" is a recommendation as to the specific fund from which payment should be made.*

The effect of this letter is concisely stated by Judge Kirkpatrick in his opinion in the District Court (R. 42):

> "In the case at hand the letter of transmittal says that the claim has received administrative examination, 'is approved for $8,899.30,' and it is recommended that the amount be paid. It is difficult to say what more the Secretary of the Interior could have done toward the final settlement of the claim. He had no right actually to order it paid by the Treasury and therefore merely recommended its payment, but he did, after examination, finally and unequivocally approve it. When he said that he was sending the claim for 'direct' settlement he probably had payment in mind, a step which all authorities

* By Section 16 of the Act of August 13, 1914, 38 Stat. at L. 690, 43 U. S. C. Sec. 414, it was provided that expenditures shall not be made for carrying out the Reclamation Law except out of appropriations made annually by Congress therefor. The Secretary of the Interior was simply designating the particular appropriation against which, in his opinion, the payment in question was chargeable.

agree is not final settlement within the meaning of the law."

Respondent will doubtless argue that the letter of the Secretary of the Interior in the present case, was not a determination of the date of performance and final settlement any more than was the letter of the Veterans' Bureau in *Lambert Lumber Co.* v. *Jones. Engineering & Construction Co., Inc.,* 47 F. (2d) 74 (C. C. A. 8th, 1931), Certiorari denied 283 U. S. 842. In the *Lambert* case, however, the Veterans' Bureau transmitted the claim to the General Accounting Office with a letter reading in part "examined in the sum of $10,975.39 and respectfully referred to the General Accounting Office for examination, settlement and approve (obviously intended to read 'approval') for payment in the amount found due * * *." Clearly, such a letter does not constitute a determination by the department having charge of the construction that the contractor has fully performed. On the contrary, that department passed the determination along to the General Accounting Office. Judge Kirkpatrick, in his opinion in the District Court in the present case, clearly points out the true effect of the letter of transmittal in the *Lambert* case, saying (R. 41):

"Plaintiff relies upon Lambert Lumber *vs.* Jones Engineering and Construction Company, 47 Fed. (2d) 74, but in that case the letter of transmittal from the administrative department

> charged with the work (the Veterans' Bureau) to the General Accounting Office was entirely different. It read in part, 'Examined in the sum of $10,975.39 and respectfully referred to the General Accounting Office for examination, settlement and approve for payment in the amount found due . . .' (Obviously the word 'approve' should be read 'approval.') The examination of an account is certainly not final settlement, and it was the clear intent of the letter to pass along to the General Accounting Office the function of making final settlement."

As far as we have been able to discover, there is not a single case which holds that language such as used in the letter of the Department of the Interior in the present case does not constitute sufficiently definite approval of the work to fix the date of performance and final settlement. On the contrary, there are many cases which hold that such language is sufficiently definite to determine the date of performance and final settlement if that determination is within the power of the department. For example, in *Mandel* v. *United States to Use of Wharton & N. R. Co.*, 4 F. (2d) 629 (C. C. A. 3d, 1925), Certiorari denied 268 U. S. 708, the proper officer of the Civil Engineer Corps of the Navy used the following language, which was held to constitute a determination of performance and final settlement:

> "The findings and recommendations of the board (reference A) are approved; * * * accord-

> ingly final payment under Contract No. 2427-B-X in the sum of $1,465.75 is authorized, subject to the execution by the contractors of an unqualified release of claim."

To say that the findings and recommendations of a subordinate board are approved and that *accordingly* payment is authorized in the specified amount is precisely the same as to attach the recommendations of the Chief Engineer and say that the claim is *approved* in a specified amount, as was done by the Department of the Interior in the present case. Both determinations are final so far as the Department having charge of the construction is concerned.

The Circuit Court of Appeals in its opinion in the present case conceded (R. 55) that prior to the Budget and Accounting Act of 1921 the Department of the Interior would have been the appropriate department to determine the date of performance and final settlement, and that the letter of the Secretary would have been such a determination. The majority of the court were, however, of the opinion that the Budget and Accounting Act of 1921 transferred this function to the General Accounting Office. If this conclusion is wrong, we submit that the judgment of the Circuit Court of Appeals must be reversed because it seems obvious that the letter of the Department of the Interior definitely determined the date of performance and final settlement if that Department had the power to do so.

For the reasons stated above, we submit that the Department had this power and accordingly we submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court of the United States for the Eastern District of Pennsylvania should be reinstated.

Respectfully submitted,

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APPENDIX.

Relevant Provisions of Budget and Accounting Act of 1921, 42 Stat. at L. 23-27.

Title III—General Accounting Office.

Sec. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the General Accounting Office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office.

Sec. 302. There shall be in the General Accounting Office a Comptroller General of the United States and an Assistant Comptroller General of the United States, who shall be appointed by the President with the advice and consent of the Senate, and shall receive salaries of $10,000 and $7,500 a year, respectively. The Assistant Comptroller General shall perform such duties as may be assigned to him by the Comptroller General, and during the absence or incapacity of the

Comptroller General, or during a vacancy in that office, shall act as Comptroller General.

[Sec. 303 prescribes the terms of office, method of removal, retirement, etc., of Comptroller General and Assistant Comptroller General.]

Sec. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing, and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

[The second paragraph of this Section relates to accounts in the Postal Service.]

Sec. 305. Section 236 of the Revised Statutes is amended to read as follows:

> "Sec. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Sec. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. Copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the General Accounting Office, when certified by the Comptroller General or the Assistant Comptroller General under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 882 and 886 of the Revised Statutes.

Sec. 307. The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office, through disbursing officers of the several departments and establishments, instead of by warrant.

Sec. 308. The duties now appertaining to the Division of Public Moneys of the Office of the Secretary of the Treasury, so far as they relate to the covering of revenues and repayments into the Treasury, the issue of duplicate checks and warrants, and the certification of outstanding liabilities for payment, shall be performed by the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury.

Sec. 309. The Comptroller General shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States.

Sec. 310. The offices of the six auditors shall be abolished, to take effect July 1, 1921. All other officers and employees of these offices except as otherwise provided herein shall become officers and employees of the General Accounting Office at their grades and salaries on July 1, 1921. All books, records, documents, papers, furniture, office equipment, and other property of these offices, and of the Division of Bookkeeping and Warrants, so far as they relate to the work of such division transferred by section 304, shall become the property of the General Accounting Office. The General Accounting Office shall occupy temporarily the rooms now occupied by the office of the Comptroller of the Treasury and the six auditors.

[Sec. 311 relates to the appointment and removal of employees.]

Sec. 312. (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular

report or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

[Sec. 312 (b) relates to investigations by the Comptroller General.]

[Sec. 312 (c) relates to reports by the Comptroller General on expenditures in violation of law.]

Sec. 312. (d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

[Sec. 312 (e) relates to the furnishing of information to the Bureau of the Budget.]

Sec. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes.

[Sec. 314 provides for Civil Service examinations of accountants in the General Accounting Office.]

[Sec. 315 relates to transfer of appropriations.]

[Sec. 316 relates to additional compensation of employees.]

[Sec. 317 relates to transfer of employees of less than three years' service.]

Sec. 318. This Act shall take effect upon its approval by the President: *Provided,* That sections 301 to 317, inclusive, relating to the General Accounting Office and the Bureau of Accounts, shall take effect July 1, 1921.

Approved, June 10, 1921.

REVISED STATUTES, SEC. 236.

All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

RELEVANT PROVISIONS OF ACT OF JULY 31, 1894, 28 STAT. AT L. 205-209.

Sec. 4. The offices of Commissioner of Customs, Deputy Commissioner of Customs, Second Comptroller, Deputy Second Comptroller, and Deputy First Comptroller of the Treasury are abolished, and the First Comptroller of the Treasury shall hereafter be known as Comptroller of the Treasury. He shall perform the same duties and have the same powers and responsibilities (except as modified by this Act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this Act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury.

Section thirty-six hundred and twenty-five of the Revised Statutes is amended by substituting the words "proper Auditor" for the words "First Comptroller of the Treasury (or the Commissioner of Customs, as the case may be)."

Section thirty-six hundred and thirty-three of the Revised Statutes is amended by substituting the words "proper Auditor" for the words "First or Second Comptroller of the Treasury."

Sec. 5. The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all

public accounts, except those relating to the postal revenues and expenditures therefrom.

Sec. 7. Accounts shall be examined by the Auditors as follows:

First.—The Auditor for the Treasury Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Treasury and all bureaus and offices under his direction, *all accounts relating to* the customs service, public debt, internal revenue, Treasurer and assistant treasurers, mints and assay offices, Bureau of Engraving and Printing, Coast and Geodetic Survey, Revenue-Cutter Service, Life-Saving Service, Light-House Board, Marine-Hospital Service, *public buildings,* Steamboat-Inspection Service, immigration, navigation, Secret Service, Alaskan fur-seal fisheries, and to all other business within the jurisdiction of the Department of the Treasury, and certify the balances arising thereon to the Division of Bookkeeping and Warrants. (Italics ours.)

Sec. 8. The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comp-

troller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government; *Provided,* That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account.

Upon a certificate by the Comptroller of the Treasury of any differences ascertained by him upon revision the Auditor who shall have audited the account shall state an account of such differences, and certify it to the Division of Bookkeeping and Warrants, except that balances found and accounts stated as aforesaid by the Auditor for the Post-Office Department for postal revenues and expenditures therefrom shall be certified to the Postmaster-General.

Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this Act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: *Provided,* That the Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant

is issued in payment of an account certified as provided in sections seven and eight of this Act.

The Auditor shall, under the direction of the Comptroller of the Treasury, preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this Act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.

Disbursing Officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursements.

Sections one hundred and ninety-one and two hundred and seventy of the Revised Statutes are repealed.

Sec. 10. The Division of Warrants, Estimates, and Appropriations in the office of the Secretary of the

Treasury is hereby recognized and established as the Division of Bookkeeping and Warrants. It shall be under the direction of the Secretary of the Treasury as heretofore. Upon the books of this division shall be kept all accounts of receipts and expenditures of public money except those relating to the postal revenues and expenditures therefrom; and section three hundred and thirteen and so much of sections two hundred and eighty-three and thirty-six hundred and seventy-five of the Revised Statutes as require those accounts to be kept by certain Auditors and the Register of the Treasury are repealed. The duties of the Register of the Treasury shall be such as are now required of him in connection with the public debt and such further duties as may be prescribed by the Secretary of the Treasury.

Sec. 11 (paragraph 2). All warrants, when authorized by law and signed by the Secretary of the Treasury, shall be countersigned by the Comptroller of the Treasury, and all warrants for the payment of money shall be accompanied either by the Auditor's certificate, mentioned in section seven of this Act, or by the requisition for advance of money, which certificate or requisition shall specify the particular appropriation to which the same should be charged, instead of being specified on the warrant, as now provided by section thirty-six hundred and seventy-five of the Revised Statutes: and shall also go with the warrant to the Treasurer, who shall return the certificate or

requisition to the proper Auditor, with the date and amount of the draft issued indorsed thereon. Requisitions for the payment of money on all audited accounts, or for covering money into the Treasury, shall not hereafter be required. And requisitions for advances of money shall not be countersigned by the Comptroller of the Treasury.

The Hurd Act (August 13, 1894, 28 Stat. at L. 278, as amended) 40 U. S. C. Sec. 270.

Sec. 270. Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials. Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no

suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said

contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to-wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.